has been no denial of that allegation. If there were grounds for mitigation it was for the appellant to have alleged and proved them:—

"The question of what is reasonable for a plaintiff to do in mitigation of his damages is not a question of law, but one of fact in the circumstances of each case, the burden of proof being upon the defendant" (see *Halsbury*, vol. 11, (3rd Ed.) para. 476, page 290).

In the present action the appellant has not pleaded or proved any fact in mitigation of damages. However, the inclusion of $11,750 in the total of the special damages is untenable since the fact was not pleaded in the statement of claim:—

"In contrast to general damages special damages must be claimed specifically and proved strictly" (see *Halsbury*, vol. 11, (3rd Ed.) para. 386, page 218).

Again:—

"In cases of tort, special damages are recoverable provided they are naturally and directly attributable to a wrongful act and are not too remote. They must however, be pleaded and proved" (see *Halsbury*, vol. II, (3rd Ed.) para. 494, page 304).

I also think that the learned trial judge should not have taken into consideration, in assessing special damages, the sum of $40,000 which the purchaser is alleged to have subsequently offered to pay in addition to the purchase price. It was, if ever made, a gratuitous offer and the contract in the circumstances would be unenforceable by virtue of the provisions of section 26 of the Contracts Ordinance, 1950. Besides, the terms of alleged oral contract amounts to a variation of a written agreement, and the evidence is inadmissible as between the parties by virtue of the provisions of section 92 of the Evidence Ordinance, 1950. In the circumstances, it is doubtful whether this item of damages was foreseeable. The purchaser, or in the unfortunate event of his death, the legal representative of his estate, can repudiate the oral offer to pay the extra $40,000, if made, with complete legal immunity. Again, in my opinion, the period during which the respondent was deprived of the use of the money should have been 29 and not 31 months, since the balance of the purchase price would have become payable only after the expiration of a two months' notice from the 1st of September, 1964, demanding payment if the applicant had complied with the notice to quit on 31st August. Therefore, the measure of special damages would be the loss of the use of $180,000 from the 1st of December 1964 to date of judgment. At 6% per annum, the loss would be $26,100 and the continuing damages would be $900 per mensem.

The appeal is dismissed with costs but the award in respect of special damages, is amended by substituting $26,100 for $45,850 and substituting $900 for $1,100 as continuing damages.

Barakbah L.P. and **Suffian F.J.** concurred.

Appeal dismissed.

REDDY v. EMPLOYEES PROVIDENT FUND BOARD

[F.C. (Barakbah L.P., Suffian & MacIntyre F.JJ.) June 13, 1968]

[K.L. — Federal Court Civil Appeal No. X44 of 1967]

Provident Fund — Withdrawal of fund — Employee leaving West Malaysia for East Malaysia — Whether leaving "Malaya" — Employees Provident Fund Ordinance, 1951, s. 13(1)(d).

Interpretation — "Malaya" in s. 13(1)(d), Employees Provident Fund Ordinance, 1951 — Interpretation and and General Clauses Ordinance, 1948, s. 2 — Malaysia Act, 1963, s. 73(1).

The appellant, a magistrate in West Malaysia, was a member of the Employees Provident Fund. He resigned from his employment, intending to work as a magistrate in East Malaysia, with no intention of returning to West Malaysia. He applied to withdraw the money standing to his credit from the fund under section 13(1)(d) of the Employees Provident Fund Ordinance, 1951, on the ground that he was "about to leave Malaya with no intention of returning thereto". The respondent, the Employees Provident Fund Board refused him authority to withdraw. The appellant applied to the High Court for a declaration that he was entitled to withdraw the money standing to his credit in the fund. The application was dismissed ([1967] 2 M.L.J. 82). In an appeal from this decision, the question before the Federal Court was whether, at the relevant date — September 30, 1965, the word "Malaya" in section 13(1)(d) of the Employees Provident Fund Ordinance, 1951, included East Malaysia.

Held, allowing the appeal: the word "Malaya" in section 13(1)(d) of the Employees Provident Fund Ordinance, 1951, did not include East Malaysia at the relevant date, for the following reasons:—

(i) section 2 of the Interpretation and General Clauses Ordinance, 1948 defined "Malaya" as "the States of the Federation and Singapore"; (ii) under section 73(1) of the Malaysia Act, 1963 (as amended by Act No. 31 of 1965) any reference in any law existing before Malaysia Day, to the Federation shall be construed as reference to Malaysia, "unless the context otherwise requires, or it is otherwise provided by any written law"; (iii) the context in which the word "Malaya" was used in section 13(1)(d) of the Employees Provident Fund Ordinance, 1951 required the court not to construe "the States of the Federation" in the Interpretation and General Clauses Ordinance, 1948 to mean Malaysia for the purposes of the Employees Provident Fund Ordinance. At the relevant date, September 30, 1965, the Ordinance did not apply to East Malaysia, and "leaving Malaya" therefore could only mean leaving the States of West Malaysia and Singapore.

Per Suffian F.J.: "the Interpretation and General Clauses Ordinance . . . still defines the States of the Federation as meaning only what is now West Malaysia . . . in my view effect must continue to be given to the definition in the Interpretation and General Clauses Ordinance. To hold otherwise would be to treat the amendment (No. 31 of 1965) as surplusage."

Per MacIntyre F.J.: " . . . even if the amendment of section 73(1) of the Malaysia Act, 1963, had not been effected by the addition of the words 'unless the context otherwise requires or it is otherwise expressly provided by any written law', I would have still allowed this appeal."

FEDERAL COURT.

Dato' Athi Nahappan (*D. P. Vijendran* with him) for the appellant.

Robert K. C. Hoh (*Ng Mann Chong* with him) for the respondent.

Cur. Adv. Vult.

Barakbah L.P.: I have had the advantage of reading the judgment of my brother Suffian. I concur with it and wish to express my views briefly.

The critical date is 30th September, 1965.

The only issue involved in this appeal is:—

What was the law by which the appellant was governed on that date?

The law applicable to him under the Employees Provident Fund Ordinance, No. 21 of 1951 permitted him to withdraw moneys to his credit if he was "about to leave Malaya with no intention of returning thereto".

"Malaya" is defined by the Interpretation and General Clauses Ordinance, No. 7 of 1948 as "meaning" the "States of the Federation and Singapore". The inclusion of Singapore and the context of "leaving" make the definition less a constitutional or political definition than a geographical definition.

If the member had applied *before* the 16th of September, 1963, his right to withdraw would have been unchallengeable. Has anything occurred between that date and 30th September, 1965, to limit or extinguish that right?

The answer is to be found in the Malaysia Act No. 26 of 1963 and the transitional provisions contained in section 73(1).

According to section 73(1) all "present laws" shall have effect according to their tenor. *Prima facie* therefore it keeps alive the right under the Employees Provident Fund Ordinance.

But section 73(1) has a proviso. It makes compulsory a change in connotation of all references to the "Federation" in "present laws" as meaning "Malaysia".

But such compulsion is avoided in three stated instances —

(i) where the present law relates to a time before Malaysia Day;

(ii) where the context otherwise requires it; and

(iii) where express provision is made otherwise.

Obviously (i) and (iii) do not apply. The resulting question is: "Does the context in which the present law should operate require the extended meaning to the 'States of the Federation' "?

The Employees Provident Fund Ordinance did *not* on 30th September, 1965, apply to East Malaysia. *Prima facie*, therefore, leaving "Malaya" only meant leaving "the States of the Federation" and Singapore. The context therefore requires not to extend the Ordinance, by a process of amending the Interpretation and General Clauses Ordinance, so as to make "Federation" include territory not included in "States of the Federation".

The Interpretation and General Clauses Ordinance defines "Federation" and "States of the Federation" separately. It is not permissible as interpretation to take a part of the phrase and extend the meaning of "Federation" as occurring in that phrase. With respect, in my view, this is where — adding and substracting from the definition of "Federation" — the learned judge erred.

The amendment to section 13(1) of the Employees Provident Fund Ordinance has now remedied this defect.

The appeal should therefore be allowed with costs here and in the court below.

Suffian F.J.: Mr. K. C. I. Reddy, a magistrate in West Malaysia (the appellant), was a member of the Employees Provident Fund. He resigned, intending to work as a magistrate in East Malaysia, with no intention of returning to West Malaysia. He applied to withdraw the money standing to his credit from the fund on the ground that he was "about to leave Malaya with no intention of returning thereto", but the Employees Provident Fund Board (respondent) refused him authority to withdraw. They said that they were not allowed by law on the agreed relevant date (30th September, 1965) to give him authority.

The matter then came up before the High Court for a ruling.

Raja Azlan Shah J. agreed that the board could not authorize the withdrawal.

Mr. Reddy appeals to this court.

The relevant provision of the Employees Provident Fund Ordinance, 1951, governing the matter is section 13(1)(d). As amended, it read before Malaysia Day (i.e., the day Malaysia came into being):—

> "No sum of money standing to the credit of a member of the Fund may be withdrawn from the Fund except with the authority of the board and, ... such authority shall not be given unless the board is satisfied that —
>
> (d) the member of the fund is about to leave Malaya with no intention of returning thereto".

Malaya was not defined by the Ordinance. Therefore the definition in the Interpretation and General Clauses Ordinance No. 7 of 1948 applied. Section 2(1) thereof provided that in every written law, unless there was something in the subject or context inconsistent with such construction —

> Malaya meant "the States of the Federation and Singapore" (item 48);

Federation meant "the Federation established in accordance with the Federation of Malaya Agreement, 1948" (item 28) and

The States of the Federation meant "the States of Johore, Kedah, Kelantan, Negeri Sembilan, Pahang, Perak, and all dependencies, islands and places which on Merdeka Day were administered as part thereof, and the territorial waters adjacent thereto" (item 86F).

The effect of these definitions was that section 13(1)(d) of the Employees Provident Fund Ordinance could before Malaysia Day be rewritten as follows:—

"No sum of money standing to the credit of a member of the fund may be withdrawn from the fund except with the authority of the board and, ... such authority shall not be given unless the board is satisfied that —

(d) the member of the fund is about to leave the States of the Federation of Malaya and Singapore with no intention of returning therto".

The effect of this was that, if before Malaysia Day a member of the fund left what is now West Malaysia with no intention of returning, to live in what is now East Malaysia, the board could authorize him to withdraw from the fund.

On 16th September, 1963, about two years before the relevant date, the Federation of Malaya was joined by Singapore and the two States of Sabah and Sarawak in Borneo. The enlarged Federation was named the Federation of Malaysia.

The Federation of Malaysia was established by the Malaysia Act No. 26 of 1963.

Section 4 thereof reads, omitting words repealed in consequence of the separation of Singapore on 9th August, 1965:—

"(1) The Federation shall be known, in Malay and in English, by the name Malaysia.

(2) The States of the Federation shall be —

(a) the States of Malaya, namely, Johore, Kedah, Kelantan, Malacca, Negri Sembilan, Pahang, Penang, Perak, Perlis, Selangor and Trengganu; and

(b) the Borneo States, namely, Sabah and Sarawak."

Two things are to be noted: first, the use of the word Malaysia in sub-section (1) as distinct from Malaya in sub-section (2)(a) and, secondly, the States of the Federation now include the Borneo States.

Section 73 of that Act, as subsequently amended by Act No. 31 of 1965 operative 1st July, 1965 and therefore material on the relevant date, reads:—

"(1) Subject to the following provisions of this part of this Act and to any law passed or made on or after Malaysia Day, all present laws shall, on and after Malaysia Day, have effect according to their tenor, and be construed as if this Act had not been passed:

Provided that references to the Federation (except in relation to a time before Malaysia Day) shall, unless the context otherwise requires or it is otherwise provided by any written law, be construed as references to Malaysia, and expressions importing such a reference shall be construed accordingly. (The words underlined were added by Act No. 31 of 1965.)

(2) Any present law of the Federation passed or made on or after the day this Act is passed shall extend to any part of Malaysia to which it is expressed to extend; but save as aforesaid no present law of the Federation shall extend to any of the Borneo States or to Singapore, unless or until it is so extended by a law passed or made as aforesaid.

(3) . . . . (not relevant).

(4) This section shall not validate or give effect to any provision contained in the present law of the Federation which is inconsistent wih the Constitution, or any provision of present law which is invalid for reasons other than inconsistency with the Constitution.

(5) In this part of this Act 'present laws' means the laws of the Federation or of any part thereof, of each of the Borneo States, and of Singapore passed or made or applied to any part of the Federation or to either of the Borneo States or Singapore before Malaysia Day, but does not include the Constitution of the Federation or of any State in Malaysia or this Act."

In my opinion the effect of section 73 is this. Both the Employees Provident Fund Ordinance and the Interpretation and General Clauses Ordinance are present laws within the meaning of sub-section (5). On and after Malaysia Day they continue to have effect according to their tenor, sub-section (1). They do not, however, extend to the Borneo States, unless and until extended by law after Malaysia Day, sub-section (2).

But the definition of the expression "the States of the Federation" in the Interpretation and General Clauses Ordinance has never been changed in consequence of Malaysia. Did it on the relevant date mean, as the appellant contends, what it meant before Malaysia Day, i.e., West Malaysia only (and Singapore)? Or did it mean, as the board contends, the whole of Malaysia (and Singapore)?

The board maintains that the definition in the Interpretation and General Clauses Ordinance is inconsistent with the enumeration of the States of the Federation by section 4 of the Malaysia Act and is therefore invalid by virtue of section 73(4).

But unfortunately everybody concerned in this case overlooked the words underlined in section 73(1) reproduced above.

I am of the opinion that the effect of the proviso (as amended) to sub-section (1) of section 73 is this, that a reference in any present law to the Federation in relation to a time after Malaysia Day, ordinarily means a reference to Malaysia. But not if the context otherwise requires, nor if it is otherwise provided by any written law — in view of the words underlined in the proviso reproduced above.

And it *is* otherwise expressly provided by the Interpretation and General Clauses Ordi-

nance which still defines the States of the Federation as meaning only what is now West Malaysia, so that in my view effect must continue to be given to the definition in the Interpretation and General Clauses Ordinance. To hold otherwise would be to treat the amendment as surplusage.

It is however to be noted that the definition in the Interpretation and General Clauses Ordinance does not apply, in the words of its section 2(1), if "there is something in the subject or context inconsistent with such construction". Is there such inconsistency? I do not think so.

The scheme of the Ordinance is to provide that an employee within its meaning whose wages do not exceed $500 per month, must join the fund, he contributing so much every month and his employer so much, both contributions to be paid into the fund which is managed by the board. The board invests the money and every year credits each member with interest. The intention is to provide the member with social security in his old age and his money together with interest cannot be withdrawn from the fund unless the board is satisfied that —

(a) the member has died;

(b) he has attained the age of 55 years;

(c) he is physically or mentally incapacitated from engaging in any further employment; or

(d) he is about to leave "Malaya" with no intention of returning thereto (this is the condition under dispute).

At the relevant time the Ordinance had not been extended to East Malaysia (it has since with modifications been extended by P.U. 644 dated 30th December, 1967), so that then an employee within the meaning of the Ordinance if in East Malaysia was not obliged to be a member of the fund. In view of this I see nothing in the subject or context requiring the court to construe the States of the Federation in the Interpretation and General Clauses Ordinance to mean Malaysia for the purposes of the Employees Provident Fund.

Indeed, the definition of Malaya by the Interpretation and General Clauses Ordinance before Malaysia Day and after Singapore's separation, to include Singapore, a foreign State, lends strong support to the view that words are used here in a very special sense, divorced from constitutional realities. To include Singapore within Malaya is politically unreal. To exclude East Malaysia from Malaysia is also politically unreal. But to do both is not legally unreal in view of the special use of language in the written law concerned.

The amendment by Act No. 31 of 1965 was not brought to the notice of the learned judge. The fact that it was overlooked by all the lawyers concerned shows the unsatisfactory state of affairs at present. If an up-to-date General Index to the Laws (which stopped publication in July 1963) had been available at the trial, the oversight would not have occurred and probably the judge might have come to a different conclusion. Ignorance of the law is no excuse, and the ordinary citizen who gropes his way through the legislative jungle, deserves our sympathy. Perhaps the authorities should resume their practice of publishing an up-to-date General Index every year.

In the press of work arising out of the creation of Malaysia, the question of modifying the Employees Provident Fund Ordinance to meet changed circumstances was probably overlooked. However, the position today is crystal clear, for paragraph (d) of sub-section (1) of section 13 has been amended to read:—

> "the member of the fund is about to leave the Federation with no intention of returning thereto or of residing in the Republic of Singapore."

The amendment was effected by P.U. 644 dated 30th December, 1967. After modifications, the Act has been extended to East Malaysia and an "employee" in East Malaysia must now be a member. If any person applied today to withdraw his money because he was about to leave West Malaysia for East Malaysia permanently, the board would have no power to authorise the withdrawal; the context alone would admit of no other construction.

In the circumstances, I would allow the appeal with costs here and in the court below.

MacIntyre F.J.: I have had the advantage of reading the judgment of my Lord, the Lord President and of my brother Suffian. I agree that this appeal should be allowed. However, I will go further and say, that even if the amendment of section 73(1) of the Malaysia Act, 1963, had not been effected by the addition of the words "unless the context otherwise requires or it is otherwise expressly provided by any written law", I would have still allowed this appeal. My reason briefly is that the meaning of the word which has to be construed is "Malaya" as used in the Employee Provident Fund Ordinance and not the word "Federation" as defined in the Interpretation and General Clauses Ordinance.

Section 73(3) of the Malaysia Act — and I am referring to the section before the amendment — declares that any reference to 'the Federation' in the present laws shall be construed to mean Malaysia, except in relation to a time before Malaysia Day. Section 73(4) declares that the section shall not validate or give effect to any provision contained in the present laws which is inconsistent with the Constitution. The controversy that has now arisen is whether "Malaya" as defined in the Interpretation and General Clauses Ordinance refers to the geographical

area comprising the Malay Peninsula and the islands which form a part of it, including the island of Singapore or it refers to the two political entities consisting of the States of the Federation and Singapore.

It is contended on behalf of the respondent that, 'Malaya' in the Employees Provident Fund Ordinance means the States of the Federation and Singapore, and therefore by virtue of the provisions of section 73(1) and 73(4) of the Malaysia Act, 'Malaya' must mean the States of West and East Malaysia and Singapore. The fallacy in this argument, stems, in my opinion, from a misconception of what is the final definition of 'Malaya' under the Interpretation and General Clauses Ordinance. The definition of 'Malaya' in the Interpretation and General Ordinance is not complete without reference to the definition of the expression "the States of the Federation". If both definitions are taken together the final definition which emerges is something more specific. If I were to re-write section 13(1)(d) of the Employees Provident Fund Ordinance in accordance with the meaning of 'Malaya' as it finally turns out to be, I would re-write it as follows:—

"(d) The member of the fund is about to leave the States of Johore, Kedah, Kelantan, Negri Sembilan, Pahang, Perak, Perlis, Selangor, Trengganu, Malacca, Penang and all dependencies, islands and places which on Merdeka Day were administered as part thereof, and the territorial waters adjacent thereto and the Island of Singapore."

If this definition is read into section 13(1)(d) of the Employees Provident Fund Ordinance then what the Federation means under the Malaysia Act is immaterial for the purpose of defining 'Malaya' under the Employees Provident Fund Ordinance. Besides the meaning of 'Malaya' as defined above is consistent with the classification of the States of Malaya in part I, clause I of the Constitution which is the same as section 4 of the Malaysia Act.

The appeal must therefore be allowed with costs here as well as in the court below.

Appeal allowed.

JANGI KOR & ANOR. v. PALANISAMY

[F.C. (Barakbah L.P., Suffian & MacIntyre F.JJ.) June 13, 1968]

[K.L.—Federal Court Civil Appeal No. X47 of 1967]

Negligence — Contributory negligence — Apportionment of liability — "Just and equitable" — Civil Law Ordinance, 1956, s. 12(1).

The respondent sustained injuries as a result of a collision between a bicycle ridden by him and a lorry driven by the appellants' driver. The trial judge found the respondent 20% at fault and awarded him damages in the sum of $10,289.60. The appellants appealed on the ground that the apportionment of liability was not consistent with the high degree of negligence displayed by the respondent.

Held, dismissing the appeal: (1) in determining the amount of damages to be awarded to a claimant who is guilty of contributory negligence, the court shall assess an amount which is just and equitable having regard to the claimant's share in the responsibility of the damage;

(2) in view of the fact that the duty of care owed by the driver of a motor lorry was far more onerous than that of the cyclist it could not be said that the apportionment of liability by the trial judge was not fair and equitable.

Case referred to:—

(1) *Davies* v. *Swan Motor Co.* [1949] 2 K.B. 291 at p. 326, C.A.

FEDERAL COURT.

F. Keith Sellar for the appellants.

D. A. Devadason for the respondent.

Cur. Adv. Vult.

MacIntyre F.J.: This is an appeal against the judgment of Ismail Khan J., in a motor accident case in which he held that there was contributory negligence and awarded the plaintiff (respondent) damages in the sum of $10,289.60 for personal injuries sustained and costs of the action.

The scene of the accident was on a highway in the village of Kuala Sungai Pekan, Malacca. A bicycle ridden by the respondent who was proceeding in the direction of Batang Malacca and a motor lorry driven by the appellants' driver in the opposite direction collided, in consequence whereof, the respondent sustained injuries to his face and skull and the loss of sight of one of his eyes.

The only point taken on appeal was that the apportionment of contributory negligence in the ratio of 80 to 20, between the appellant and respondent, respectively was inconsistent with the high degree of negligence displayed by the respondent. How the problem of apportionment should be approached is evident from the provisions of section 12(1) of the Civil Law Ordinance, 1956. The relevant part of the section reads:—

"When any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of a person suffering the damage, but the damage recoverable thereof shall be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage."

According to these provisions, the apportionment must be 'just and equitable' and what is just and equitable would depend upon the claimant's share of responsibility for the damage. In *Davies* v. *Swan Motor Company* (1) Denning L.J. commenting on section 1(1) of the Law Reform (Contributory Negligence) Act, 1945 which is the same as section 12(1) of the Civil Law Ordinance said:—